IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 522

BALFOUR, GUTHRIE & CO., LTD., and
COMMONWEALTH AFRICAN, LTD.,
Petitioners,

against

Steamship "ZAREMBO," her engines, etc., AMERICAN-WEST AFRICAN LINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

D. ROGER ENGLAR,
MARTIN DETELS,
EZRA G. BENEDICT FOX,
Proctors for Petitioners.

INDEX

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Balfour, Guthrie & Co., Ltd., and Commonwealth African, Ltd., for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Statement of the Matter Involved

Petitioners are owners of cocoa beans seriously damaged while being carried by respondent, a common carrier, from West Africa to New York in January, 1940, as part of the cargo aboard the steamship "Zarembo." Petitioners filed a libel in admiralty for cargo damage in the United States District Court for the Eastern District of

New York and respondent filed an answer claiming exemption from liability under a Federal statute enacted in 1936, namely the United States Carriage of Goods by Sea Act (46 U. S. Code, Secs. 1300-1315) (R. 21-23). The pertinent parts of this statute are printed in Appendix A, pages 23-25.

The Circuit Court of Appeals affirmed the judgment of the District Court in favor of the shipowner (R. 1342) and on September 29, 1943, denied a petition for rehearing (R. 1350).

Jurisdiction

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution.

The Facts

The "Zarembo" was unseaworthy at the time she sailed (R. 1296, 1343). This unseaworthiness was not a mere minor defect. On the contrary it was a serious wastage in the outer plating of the hull which threatened the safety of the ship and the lives of all on board,—as shown by the fact that when the unseaworthy plate cracked in two different places and admitted large quantities of seawater through cracks several feet long (R. 112, 159), the Master, after consultation with his officers, put back to Bermuda as a port of refuge (R. 43).

The "Zarembo" was then 20 years old (R. 1273) and her outside hull plating where it subsequently cracked was worn so thin that less than 25% of its original thickness remained. In other words, there was a wastage of 75%, which is three times the maximum ordinarily considered safe (R. 1343). The worn plate finally failed in two places (R. 1287) "in the centers of well defined grooves, both on the inside and outside of the ship" (R. 1295), and seawater poured into the No. 1 hold where it damaged petitioners' cargo.

The wastage of the plate was a gradual process, which occurred over a period of years (R. 232, 260, 273, 354).

More than a year before the failure of the plate involved in the present suit, one of the adjoining plates had been condemned on a regular survey because it was "commencing to show signs of considerable wastage" (R. 983). However, the American Bureau surveyor agreed to pass the plate "until the next drydocking" in consideration of the owner's promise to renew the plate at that time (R. 989). This promise was not kept and there is no suggestion in the evidence that the area around this condemned plate was given any special inspection. It is particularly noteworthy that the cargo battens over these plates were not removed when the vessel was inspected prior to the voyage on which the failure occurred (R. 274). The importance of this circumstance is clearly evident from an inspection of the photograph (Libellants' Trial Exhibit 27) reproduced in the Appendix C (p. 27) hereof, which shows the impossibility of making any detailed examination with these battens in place.

Nevertheless, the Courts below held that the shipowner should be exculpated from liability for the seawater damage under the construction which they placed upon the United States Carriage of Goods by Sea Act (46 U. S. Code, Sec. 1304, printed in Appendix A, at p. 24) with respect to the degree of diligence demanded of the shipowner.

In the majority opinion of the Circuit Court of Appeals, it is stated that during two surveys before the voyage "the plating was hammer tested, inside and out, by at least one surveyor" (R. 1343). This statement, however, refers to the hull plating, generally. It is not intended as a statement that anyone hammer tested *the defective plate.* It is based upon the testimony of two of the shipowner's witnesses who said that they went around with a hammer and tapped some of the plates (R. 243, 255, 266, 267). There is no evidence in the record that a surveyor or anyone else ever applied a hammer test to the worn plate which failed. This worn plate was quite large, being 18½ feet

by 5½ feet (R. 112)—as wide as one man standing up and as long as three men lying down. This plate, known as the G-2 plate, was one of the hull plates on the outside of the vessel toward the bow in precisely the place peculiarly subject to panting stresses due to bending of the plate about the axes formed by the longitudinal frames as the vessel plunges into head seas. "Panting" is a phenomenon well known to marine surveyors and is caused by the alternate application and release of pressure upon the hull plates where the bow breasts the waves (R. 152, 153, 182, 198).

The *outside of this worn and corroded plate* formed part of the outside of the vessel and was in full view not only when the vessel was on drydock but also while afloat excepting only when she was loaded deeper than the 8½ foot draft mark. It was not under water on the outward voyage (R. 935). The two grooves where the plate finally cracked were both above water at all times when the "Zarembo" was drawing not more than 10½ feet, one being at about the 10 foot 8 inch draft and the other at about the 13 foot 1½ inch draft mark (R. 157). The two cracks in the grooves where the plate had wasted away were two and three feet long (R. 112, 159), but the grooves themselves extended for some distance beyond the cracks at both ends (R. 160, 163, 201, 940). The *inside of the plate* formed part of the walls of the No. 1 hold and would have been completely visible whenever that hold was free of cargo but for the fact that it was half covered by cargo battens (Exhibit 27, reproduced in Appendix C (p. 27) hereof) which were not removed even for the much vaunted four-year special survey just before the voyage in question (R. 263, 274).

This, therefore, was not a case of overlooking a single small defective rivet among the many thousands of rivets in a ship, or of failing to find a latent defect in some small pipe or fitting hidden within the hull. It was the gradual grooving and wearing thin by corrosion and panting over a long period of time of one of the big hull plates which

form the outside shell of the vessel, above the light load line, in two long grooves to a depth of more than three-fourths of the thickness of the plate.

The Decision of the Circuit Court of Appeals

Both the District and Circuit Courts unanimously and concurrently found: (1) that the ship was unseaworthy at the time she sailed (R. 1296, 1343); (2) that this unseaworthiness consisted in her 20 year old plating being worn thin far beyond (more than three times) the maximum wear considered safe (R. 1296, 1343); (3) that the plate cracked in the two very places where it was so worn (R. 1295, 1343); and (4) that the water which damaged petitioners' cargo entered the hold through these two cracks (R. 1295, 1342). Nevertheless, the Courts below held that the shipowner had shown sufficient diligence to relieve himself of liability under the Federal statute. There being no conflict of evidence as to what was done by any of the witnesses whose testimony is relied on to establish such diligence, this raises a pure question of law, namely as to whether the statutory standard of diligence has been met by the shipowner's proof. The statute itself expressly provides that the shipowner has the burden of proof on this issue (46 U. S. Code, Sec. 1304, printed in Appendix A, at p. 24), and this was specifically found by the district judge (R. 1296—Third Conclusion of Law). It is quite clear from the majority opinion of the Circuit Court of Appeals that their conclusion that the shipowner had exercised due diligence rested upon the fact that the vessel had gone through two surveys, that *some* of the plating (but not the big worn plate which cracked in two places) was hammer-tested, and that "numerous visual examinations" were made.

We assume that no one will seriously contend that a competent and diligent surveyor cannot by a proper examination ascertain the unseaworthy condition of a large steel hull plate which has wasted away, in two grooves several

feet long on both the outside and the inside of the plate, to a fourth of its original thickness.

Accordingly, the decision of the Circuit Court of Appeals can be explained only on one of two theories:

1. That the statutory requirement of due diligence is satisfied by employing reputable surveyors and the customary crew. This Court clearly and emphatically rejected such a construction of the statutory requirement of due diligence under Section 3 of the Harter Act (a statute enacted in 1893, the pertinent parts of which are printed in Appendix B, pp. 25-26) in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, 225, 226, when it held in no uncertain terms that the duty of due diligence cannot be delegated, and that the shipowner is bound by the negligence of the particular individual who actually made the examination or inspection.

2. The only other theory upon which the decision of the Courts below can be explained without violating the views expressed by this Court in *International Navigation Co.* v. *Farr & Bailey*, is that the surveyors and others exercised due diligence by merely looking at this plate and hammer testing a few others. It is submitted, however, that the holding below cannot be justified on this ground, in view of the following facts stated in the majority opinion of the Circuit Court of Appeals, namely (1) that so much corrosion had previously been found on the plate adjacent to the one which cracked that its renewal had been recommended by a surveyor in January 1939, a year before (R. 1343), and (2) that the American Bureau of Shipping had warned all its surveyors more than two years before the voyage in question that longitudinally framed ships like the "Zarembo" should be watched for grooving and corrosion (R. 1343). Moreover, it is obvious that even a visual inspection would have much less than its usual value unless the battens were removed (Exhibit 27—reproduced in Appendix C, p. 27).

Questions Involved

The sole questions at issue therefore, are:

I. Does the Carriage of Goods by Sea Act permit shipowners to relieve themselves of liability for damage arising from failure to furnish a seaworthy vessel merely by employing reputable surveyors?

II. Is the Carriage of Goods by Sea Act requirement of due diligence satisfied by any inspection or test which does not disclose dangerous unseaworthiness due to the gradual wasting away of the outside shell plating of a vessel over a period of years, to the point where the plates are reduced to less than a fourth of their original thickness and less than a third of the thickness commonly accepted as the minimum for safety?

Reasons for Granting the Writ

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

This case involves a question of law of general commercial importance, namely the construction of a federal statute enacted by Congress in 1936 and which has never been construed by this Court. This statute, the Carriage of Goods by Sea Act, determines and controls the rights and liabilities of all shipowners, ship operators and merchants, importers and exporters, shippers, consignees, banks and other holders of bills of lading evidencing a contract for the carriage of goods by sea in foreign trade either to or from United States ports (U. S. Code, Sec. 1300, printed in Appendix A, at p. 23). The liability of shipowners engaged in foreign trade, to or from our ports, for loss of or damage to cargo arising from failure to furnish a seaworthy ship, concerns not only the parties involved in

this particular controversy but all shippers, consignees and owners of cargo carried to or from United States ports and banks and other holders in due course of negotiable bills of lading purchased in reliance upon this statute which by its terms specifically places upon shipowners a duty to exercise due diligence to make the ship seaworthy and fit and safe for the carriage and preservation of the cargo covered by the bills of lading issued by the shipowner under this statute (46 U. S. Code, Sec. 1303 (1)).

The Carriage of Goods by Sea Act is not peculiar to the United States. It is the enactment of an international sea code which merchants found necessary to protect themselves from an endless variety of bills of lading full of fine print designed to relieve the shipowner of liability for loss or damage to the cargo resulting even from failure to furnish a seaworthy ship. After many years of agitation, the Maritime Law Committee of the International Law Association, in consultation with representatives of various interests, drew up in 1921 what were known as the Hague Rules which were issued for the consideration of the commercial public. The following year the delegates at the Diplomatic International Conference on Maritime Law in Brussels unanimously recommended the adoption of a draft Convention which in effect embodied the Hague Rules, as the basis of a Convention between the participating States, and contemplated that each State would, when the Convention became effective, give the rule statutory force with respect to all outward bills of lading. *Temperley's Carriage of Goods by Sea Act, 1924,* 4th Edition, pages 3-4. The Hague Rules were enacted into law by Australia and England in 1924, and by Canada and the United States of America in 1936, and have by now been given statutory force by most of the nations, protectorates, colonies, etc. of the British Commonwealth of nations. *Scrutton on Charterparties and Bills of Lading,* 14th Ed., pages 569-77. The American Act giving statutory effect to these Rules applies to contracts of carriage both to as well as from United States ports in foreign trade (46 U. S. Code, Sec. 1300).

2. The decision of the Circuit Court of Appeals conflicts with the decisions of other Circuit Courts of Appeals on the same matter:

The inevitable inference to be drawn from the opinion of the Circuit Court of Appeals for the Second Circuit is that a shipowner discharges his duty of due diligence by employing reputable surveyors to make periodic examinations irrespective of whether the surveyors themselves exercise due diligence. In other words, the Circuit Court of Appeals for the Second Circuit held that a shipowner can delegate the duty of due diligence to make the ship seaworthy. Not only is this in clear conflict with the decision of this Court in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, 225, 226, but it also conflicts with the following decisions of other Circuit Courts of Appeals which, following the views expressed by this Court, decided that the duty of due diligence is nondelegable.

FOURTH CIRCUIT

The Maria, 91 F. (2d) 819, 824;
The Pinellas, 45 F. (2d) 174, 177;
Nord Deutscher Lloyd v. *Insurance Company of North America*, 110 Fed. 420, 427.

FIFTH CIRCUIT

The Framlington Court, 69 F. (2d) 300, 307;
The Leerdam, 17 F. (2d) 586, 587.

NINTH CIRCUIT

Bethlehem Shipbuilding Corporation v. *Gutradt Co.*, 10 F. (2d) 769, 771;
The Feltre, 30 F. (2d) 62, 64.

The foregoing cases were decided under the Harter Act (46 U. S. Code, Sec. 192), whereas the present decision of the Circuit Court of Appeals for the Second Circuit is based

upon the Carriage of Goods by Sea Act. However, the Carriage of Goods by Sea Act was itself based upon the Hague Rules (1923 A. M. C. 63) which in turn were based on the Harter Act, and it has been held both in this country and in the English courts, including the House of Lords, that where the same language is used, it will be given the same construction in the later Acts that was placed upon it in the Harter Act.

Spencer Kellogg & Sons v. *Great Lakes Transit Corporation,* 32 F. Supp. 520;
Gosse Millerd, Ltd. v. *Canadian Government Merchant Marine,* (1929) A. C. 223;
Hourani v. *T. & J. Harrison,* 32 Com. Cas. 305 (C. A.).

Incidentally, in the *Spencer Kellogg* case, *supra,* Judge TUTTLE in the Eastern District of Michigan applied the doctrine of the *International Navig. Co.* v. *Farr & Bailey Mfg. Co., supra,* to the Carriage of Goods by Sea Act (p. 530 of 32 F. Supp.).

The District Court in the present case rendered lip service to the law as laid down by this Court in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.,* 181 U. S. 218, 225, 226, from which he quoted in his opinion, stating that the obligation of the shipowner to use due diligence to make the vessel seaworthy under the Carriage of Goods by Sea Act is the same as under the Harter Act and that the duty of the carrier to use due diligence is not satisfied by delegating that duty to a third person (R. 1274). The Circuit Court of Appeals, however, although the controlling authority of *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.* was quoted from in appellants' brief and cited again in appellants' reply brief, and the Court's attention was specifically directed to it in the petition for rehearing in which it was the only case mentioned (R. 1349), appears to have ignored or disregarded the case completely, for it is not even mentioned in their opinions.

3. The Circuit Court of Appeals has decided a question of federal law contrary to the principles laid down by this Court.

The Circuit Court of Appeals for the Second Circuit has in effect held that the shipowner may delegate to surveyors the duty of due diligence to make his ship seaworthy which is imposed upon shipowners by the Carriage of Goods by Sea Act.

In *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 225, 226, this Court held that the duty of due diligence under the Harter Act cannot be delegated. The pertinent provisions of the Harter Act with respect to due diligence are similar to the corresponding provisions of the Carriage of Goods by Sea Act, which is based upon it, as will readily appear by comparison of the texts set forth in Appendix A (pp. 23-25) and B (pp. 25-26).

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this Court for review, a full transcript of the record in the said Circuit Court of Appeals in the case entitled on its Docket No. 298, October Term 1942, *Balfour, Guthrie & Co., Ltd. and Commonwealth African, Ltd., Libellants-Appellants,* v. *American-West African Line, Inc., Claimant-Appellee;* and that the decree of the United States Circuit Court of Appeals for the Second Circuit dated September 29, 1943 be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as may be just.

Dated: New York, November 30, 1943.

BALFOUR, GUTHRIE & CO., LTD., and
COMMONWEALTH AFRICAN, LTD.,
Petitioners,

By D. ROGER ENGLAR,
MARTIN DETELS,
EZRA G. BENEDICT FOX,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is officially reported in 44 F. Supp. at page 915. It is also reported in 1942 American Maritime Cases at page 544. The District Court's findings of fact and conclusions of law are printed at pages 1286 to 1297, and its opinion at pages 1272 to 1284 of the Record. The District Court decree appears at pages 1298 and 1299 of the Record.

The opinion of the Circuit Court of Appeals is officially reported in 136 F. (2d) at page 320. It is also reported in 1943 A. M. C. at page 954 and appears at pages 1342 to 1347 of the Record.

Jurisdiction

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution.

Facts

The facts are stated in the petition and will not be repeated here.

Specifications of Error

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that shipowners may discharge the statutory duty of due diligence under the Carriage of Goods by Sea Act by employing reputable surveyors;

(2) In holding that the statutory requirement of due diligence is satisfied by an examination which does not disclose such major unseaworthiness as the wasting away of the outside shell plating of a vessel over a period of years to a point where the plates are reduced to less than a third of their original thickness and less than half of the thickness commonly regarded as a safe minimum.

POINT I

The standard of diligence imposed by this Act is at least as high as the standard by which diligence was measured under the Harter Act; and the shipowner cannot, under either Act, relieve himself of his duty by delegating it to a third party.

The pertinent provisions of both Acts are set forth in Appendix A and B hereof. Section 4, subdivision 1, of the Carriage of Goods by Sea Act (46 U. S. Code, Sec. 1304, sub. 1; Appendix A at p. 24) exempts the carrier from liability for loss "resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier

to make the ship seaworthy." The analogous provision in the Harter Act is contained in Section 3 (46 U. S. Code, Sec. 192; Appendix B at p. 25), which exonerates the shipowner from liability for loss "resulting from faults or errors in navigation or management of" the vessel, provided that the shipowner has exercised "due diligence to make the said vessel in all respects seaworthy." It is to be noted that Section 2 of the Harter Act (46 U. S. Code, Sec. 191; Appendix B at p. 25) merely makes unlawful and invalid any bill of lading agreement lessening, weakening or avoiding the obligation of the shipowner under the general maritime law "to exercise due diligence * * * to make said vessel seaworthy." The Carriage of Goods by Sea Act, however, goes farther and in Section 3, subdivision 1 (46 U. S. Code, Sec. 1303, sub. 1; Appendix A at p. 23), provides that "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to (a) make the ship seaworthy; * * *." In view of the affirmative imposition of a statutory duty to exercise due diligence, it seems clear that the nature and extent of that duty should be measured by the judicial interpretation previously given to the phrase "due diligence" as used in the Harter Act. As Judge TUTTLE pointed out in *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.*, 32 F. Supp. 520, at pages 531-2, "* * * the 1936 Act has not reduced the standards by which the seaworthiness of a vessel is to be tested, nor the requirements that constitute the exercise of due diligence." See also cases cited at page 10, *supra*.

In *International Navigation Co.* v. *Farr & Bailey*, 181 U. S. 218, 225, 226, this Court held that the duty of due diligence under the Harter Act cannot be delegated.

In *Wilsons & Clyde Coal Co.* v. *English*, 1938 A. C. 57, Lord WRIGHT, in the course of his concurring opinion in the House of Lords, stated at page 80:

> "If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence or to take reasonable care to

> provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert; the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

That the duty of due diligence cannot be delegated under the Harter Act has been settled law since this Court decided the case of *International Navigation Co.* v. *Farr & Bailey*: see the decisions of the Circuit Court of Appeal for the Fourth Circuit in *The Maria*, 91 F. (2d) 819, 824; *The Pinellas*, 45 F. (2d) 174, 177; *Nord Deutscher Lloyd* v. *Insurance Company of North America*, 110 Fed. 420, 427. See also the decisions of the Circuit Court of Appeals for the Fifth Circuit in *The Framlington Court*, 69 F. (2d) 300, 307, and *The Leerdam*, 17 F. (2d) 586, 587. In the latter case the court summed up the rule as follows:

> "Due diligence to make a vessel seaworthy must in fact have been exercised. It is not sufficient for a shipowner to show that he had employed competent men to do the work, but he is held responsible for the failure of the men he employs" (p. 587 of 17 F. (2d)).

The Ninth Circuit, particularly, has accepted without question the doctrine of *International Navigation Co.* v. *Farr & Bailey*. See *The Feltre*, 30 F. (2d) 62, at page 64 (C. C. A. 9), and *Bethlehem Shipbuilding Corp.* v. *Gutradt Co.*, 10 F. (2d) 769 (C. C. A. 9). The latter case is particularly interesting. There cargo shipped by the Gutradt Company was damaged by seawater which entered the hold through a defective clapper valve. The Pacific Mail Company had employed the Bethlehem Shipbuilding Corporation to overhaul and repair all clapper valves on the ship's sides and the vessel had been redelivered to the carrier only a few days before the cargo was loaded. In affirming the District Court decree (1925 A. M. C. 1818), which held the

shipowner primarily liable, the Circuit Court of Appeals said at page 771:

> "It is clear to us that, when the ship was redelivered to the Pacific Mail Company, the shipbuilding corporation had broken its contract by failing to repair the clapper valves in No. 2 hold, and a mere statement of the fact that the defective clapper valve let the water in compels the view that the ship was unseaworthy. It therefore devolved upon the steamship company to show that due diligence was exercised to make the ship seaworthy under the pertinent provisions of the bill of lading.
>
> As between the Pacific Mail Company and the Gutradt Company, the duty of making the ship seaworthy was a nondelegable one; hence the steamship company could not successfully defend on the ground that it had made a contract with the shipbuilding corporation to repair and overhaul the clapper valves unless it could also show that the shipbuilding corporation had performed its contract."

POINT II

Any inspections or tests which do not disclose such flagrant and dangerous unseaworthiness as threatened the lives and property of the passengers and crew as well as the cargo of the "Zarembo" do not satisfy the statutory duty of due diligence to furnish a seaworthy ship.

The foregoing proposition would appear to be self-evident: "due" means "appropriate," and due diligence means that degree of care appropriate to the degree of danger to be anticipated from a breach of the particular seaworthiness to which the diligence is directed. See *The R. P. Fitzgerald*, 212 Fed. 678, at page 684 (C. C. A. 6th); Judge Hough's observations in *The Julia Luckenbach*, 235 Fed. 388, at page 390; and the other cases cited at pages 19-21, *infra*. For example, the danger to be anticipated from

a loose rivet in a tank top is simply the leakage of a small amount of oil or water which may damage some of the cargo, but would be quite unlikely to threaten the safety of the ship. Obviously, therefore, the degree of diligence appropriate to locating such a loose rivet would be utterly inadequate in the case of the outside shell plating of a 20-year-old vessel which has worn thin to the point where it has lost three-fourths of the thickness which the naval architects and builders considered proper for the protection of the vessel.

Respondent is challenged to cite a single case in which a shipowner has been exculpated by reason of mere visual examinations from liability for damage due to the wasting away of a vessel's outside plating. In fact, even in case of leaky rivets and piping the shipowner has generally been held to a standard of diligence requiring something more than a mere visual examination.

The very fact that this condition of surface corrosion which (in the opinion not only of petitioners' experts but also of three surveyors, called by respondent) had existed for years, was not found by the inspections in New York in November, 1939, is the best possible proof that those inspections were inadequate and insufficient. In *The Georg Dumois,* 88 Fed. 537, the court said at pages 541-2:

> "it seems evident that such an accident, for which no immediate cause can be given, indicates that the means of inspection employed in New York were imperfect, and that the inspection itself was negligent and insufficient."

In that case leakage from corroded staybolts was discovered about a week after the boiler had been repaired and "a most thorough and sufficient inspection indicated no leakage."

In *The Julia Luckenbach,* 235 Fed. 388, the Circuit Court of Appeals approved the opinion of Judge HOUGH in the District Court, in which he had stated (p. 389 of 235 Fed.):

> "The immediate cause of flooding the hold and of the consequent destruction of sugar was the sudden breaking of the impaired plate. Such impairment of plate had evidently existed long before the beginning of the voyage, * * *. (p. 390) Due diligence must always be proportioned to the amount of danger reasonably anticipated, so it is evident that owners of this ship were bound to exercise special care to guard against the special danger that has produced this great loss."

In *Brazil Oiticica, Ltd.* v. *S. S. Bill*, 47 F. Supp. 969 (D. C. Md.), the Court held that corrosion on the inside of a steel bilge pipe was not a latent defect within the Carriage of Goods by Sea Act, stating at page 978:

> "More importantly the contention is untenable because the defect in the bilge pipe was not a true latent defect. The defect in the bilge pipe was not due to any flaw in the metal, but to the corrosive effect of foreign substances resulting from the use of the ship. A latent defect is one that could not be discovered by any known and customary test. *The Carib Prince*, 170 U. S. 655, 658, 663; *The Citta di Palermo* (D. C.), 226 Fed. 522, 526. Such cases as the *Quarrington Court* (2d Cir.), 122 F. (2d) 266, and *The Indrani*, 177 Fed. 914 (2d Cir.) cited by counsel for the shipowner are really not in point here because the damages there resulted from a sudden and fresh breaking of pipes caused by a flaw or defect in the metal, and were not the result of gradual deterioration as happened in the instant case."

In *The Millie R. Bohannon*, 64 Fed. 883 (S. D. N. Y.), Judge Brown said (p. 884):

> "'Due diligence' requires a carefulness of inspection and repair proportionate to the danger. *The Edwin I. Morrison*, 153 U. S. 199, * * *. From the facts respecting this leak and the circumstances, it is impossible for me to believe that such a careful, diligent examination as the construction of this vessel made necessary, would not have disclosed the defects in the seams about the centerboard; or that the inspection, by which the vessel is now sought to be justified, was other than casual, and superficial."

In the present case the owners are clearly chargeable with notice of the danger of a failure of the hull plating particularly in the vicinity of the G-2 plate. In the *first* place the vessel was 20 years old; in the *second* place she was operating in a trade where heavy sweating of the holds, which creates corrosion along the lines of the longitudinals in a longitudinally framed ship (513, 622-4, 640, 652, 1606-10), was to be expected (318, 320-3, 343-4, 371-4, 1020, 2636, 3107-9, 3122); in the *third* place it was a matter of common knowledge that plates in the vicinity of the G-2 plate are subjected to more strain through "panting" than other hull plates; and *fourthly* when the "Zarembo" was on drydock in January 1939, just one year before this accident, the attention of her owners had been called to the fact that the F-1 plates on both port and starboard sides showed signs of considerable wastage and should be renewed.

In the case of *The Tela,* 1936 A. M. C. 838, 840, Mr. James S. Hemingway, as arbitrator, used the following very pertinent language in his award:

> "While it may be unnecessary to test every plate in a ship at the time of a classification survey, it seems clear that this particular plate should have been tested because the plates immediately above and below it were evidently found to be in poor condition and were renewed, as were other plates in this hold. It must also be borne in mind that this ship was almost twenty years old and her plates should have been more carefully examined than the plates of a new ship."

In *Nord Deutscher Lloyd* v. *Insurance Company of North America,* 110 Fed. 420, a Harter Act case, the Circuit Court of Appeals for the Fourth Circuit said at page 427:

> " 'Diligence' and 'negligence' are relative terms, and depend on varying circumstances. Due diligence requires such watchful caution and foresight as the circumstances of the particular service demand. *It must be adequate to the occasion. It must be due*

diligence in the work itself, and not merely in the selection of agents to do the work; otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved whether such agents exercised due care or not to make their vessel seaworthy, and any responsibility would be frittered away. * * * No construction should be given to the act which would relieve them of the duty of that vigilant anxiety and solicitude which is required to make their vessels seaworthy." (Italics ours.)

Conclusion

Because the Circuit Court of Appeals for the Second Circuit has decided an important question of admiralty law contrary to the decisions of this Court and of the other Circuit Courts of Appeals, and because this question involves the construction of a new federal statute based upon an international convention designed to bring about uniformity in the maritime law as applied by the various maritime nations of the world, and because this statute has not yet been before this Court for consideration, we submit that a writ of certiorari should be granted in this case.

Respectfully submitted,

D. Roger Englar,
Martin Detels,
Ezra G. Benedict Fox,
Proctors for Petitioners.

[Appendix Follows]

APPENDIX A.

CARRIAGE OF GOODS BY SEA ACT OF 1936, 46 U. S. Code, Chapter 28:

"§ 1300. BILLS OF LADING SUBJECT TO CHAPTER.

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter and section 25 of Title 49.

* * * * * *

§ 1302. DUTIES AND RIGHTS OF CARRIER.

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1304 and 1305 of this title.

§ 1303. RESPONSIBILITIES AND LIABILITIES OF CARRIER AND SHIP.

(1) Seaworthiness. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo. The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * * *

(8) Limitation of liability for negligence. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the

goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

§ 1304. RIGHTS AND IMMUNITIES OF CARRIER AND SHIP.

(1) Unseaworthiness. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss. Neither the carrier nor the ship shall be responsibile for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

* * * * * *

(c) Perils, dangers, and accidents of the sea or other navigable waters;

* * * * * *

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither

the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

* * * * * *

APPENDIX B.

Harter Act, February 13, 1893, C. 105, sec. 2 & 3; 46 U. S. Code, Sections 191 & 192:

"SEC. 2: STIPULATIONS RELIEVING FROM EXERCISE OF DUE DILIGENCE IN EQUIPPING VESSELS. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

"SEC. 3: LIMITATION OF LIABILITY FOR ERRORS OF NAVIGATION, DANGERS OF THE SEA AND ACTS OF GOD. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package,

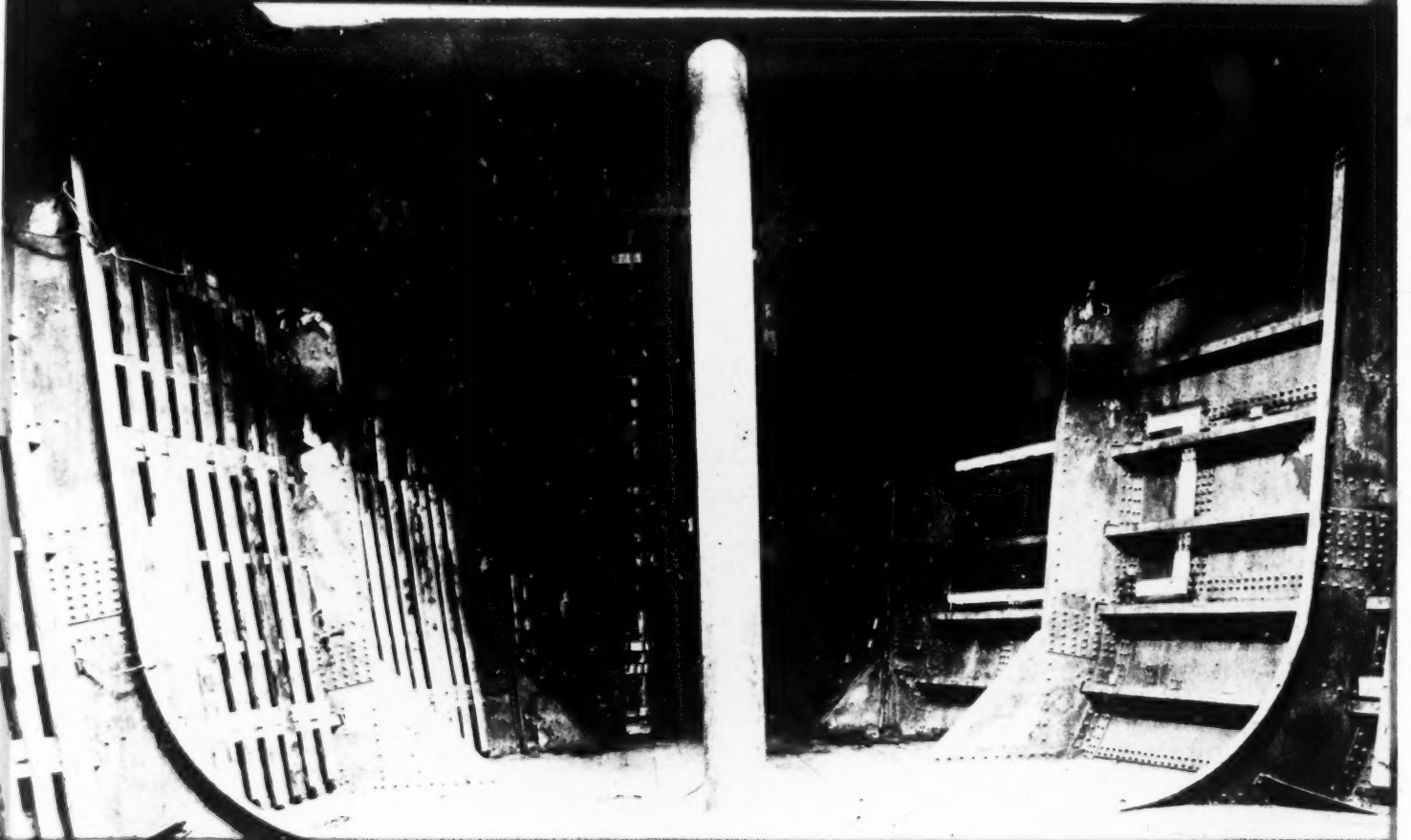
or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

* * * * * *

APPENDIX C.

(Photolithograph of Libellants' Trial Exhibit 27.)

See next page.



12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 522

BALFOUR, GUTHRIE & CO., LTD., and COMMONWEALTH AFRICAN, LTD.,

Petitioners,

against

Steamship ZAREMBO, her engines, etc., AMERICAN-WEST AFRICAN LINE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEO. WHITEFIELD BETTS, JR.,
Counsel for Respondent.

TABLE OF CONTENTS

Table of Cases

Other Authority Cited

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Statement

Although in the courts below the Zarembo was found unseaworthy as to the particular plate in which the two cracks occurred, this unseaworthiness consisted of a latent defect, as found by the District Court. It was not a case of wearing or wastage of the plate but a weakening and oxidation of the metal along the edge of two longitudinal beams and in the line of the two cracks due to stresses in the plate, differences of potential and action of salt

water, the oxidized and fatigued metal remaining in the plate in the line of the cracks (*infra*, p. 8). There was no evidence in the case that the plate was worn thin before the cracks occurred. After the cracks had occurred and the plate was removed at New York, the thickness of the metal at the bottom of the grooves where the cracks occurred showed more than a reduction in thickness of 25%, the limit usually accepted as the maximum (Opinion District Court, 1273, 1274*). The defect however was a minor one as the edges of the two cracks (one about 2 feet and one about 3 feet long) were so close together that Mr. Stanley, the expert for petitioners, was unable to get the blade of his small pocket knife into the crack (203). The evidence is overwhelming that the grooves in the centers of which the cracks occurred became grooves only when the cracks occurred and the hard oxidized metal in the grooves was dislodged at the time of the cracking (1281, 285, 294, 295, 292, 350-352, 1091-1094, 333, 342-343, 1127). Even when the cracks occurred, no damage would have happened were it not for the fact that the petitioners' insufficient bags, into which sample holes had been punched, permitted the small beans to escape and get down into the bilges and suctions and clog the pumps (684, 563, 564, 853); otherwise the pumps could have taken care of all the water which could get through the two cracks (853).

It was impossible to tell when this weakening or oxidizing of the metal started as it could not be seen from the outside (285, 282, 1092).

The statement on page 3 of petitioners' petition that one of the adjoining plates had been condemned on a survey because showing signs of wastage is inaccurate. There was no condemnation but only a recommendation by the surveyor that the F-1 plates be renewed at the next regular drydocking which would have been within a year (989). These plates were not adjoining plates (993, 555, 601, 605)

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* All references in this brief are to pages of the Record.

but were in the forepeak tank while the plate that cracked was in No. 1 hold (1279). These two plates were drilled in January 1939 and found to be perfectly good for another year (303), a staging being erected in the drydock to more carefully examine the bow plates and drill the two plates (989).

In November, 1939, these F-1 plates were examined again and found to be satisfactory until the next annual drydocking (966, 967, 989), and it is undisputed that no leakage occurred in these plates, even in the terrific weather that the Zarembo encountered on the voyage in question.

Special attention was given to the bow plates on the numerous examinations before the vessel sailed (959, 551, 243, 982, 331). On the January, 1939, survey, referred to by petitioners, *the cargo battens or wooden vertical strips had been removed at the time the vessel was inspected*, inside and outside (245). Although they were in place on the November, 1939, survey, just before the vessel sailed, the photograph (Libellants' Exhibit 7) attached to the appendix to the petition, is very misleading. It clearly shows that it was taken from the after part of the hold looking forward. Naturally the distances between the cargo battens would look much narrower than if the photograph were taken at right angles. The evidence is also undisputed that the cargo battens did not interfere at all with the examination of the plate (872) and the District Court so found (1288). They were from six to seven inches apart and only five and one-half inches wide and seven inches from the plate by actual measurements (1002).

The petition (p. 3) refers to the "majority opinion of the Circuit Court of Appeals." However, the concurring opinion agreed with the finding of the majority, that due diligence had been exercised and only differed on the question of the effect of the claim clause, which, however, became immaterial because of the finding that the 53 bags in

question were in the No. 1 hold with the other bags and damaged by sea water (1295).

On the November, 1939, survey, just before the ship sailed on the voyage in question, Capt. Kelly, the U. S. Inspector, had a hammer and knocked the rivet heads and any places on the plates in the No. 1 hold, which showed any evidence of corrosion, and Atwood, the Chief Officer, had a 12″ bent-end file scraper and used one end to sheer into and scrape off any place where there was a little film of rust or flick of paint and the other end to knock a rivet head or knock in the middle of the plate (551, 555). He remembered distinctly knocking with his scraper on the G-2 plates. They had butt straps and so were easy to remember (551). Petitioners' experts testified that the use of such a scraper is perfectly satisfactory (427). The evidence is undisputed that the plating was hammered on both surveys where there were any signs of corrosion, and petitioners' experts appear to agree that that was the usual method (389-390; 426-427), and both Courts so found (1343, 1275).

It is undisputed that no grooves were visible on the outside or inside of this G-2 plate at the time of the January, 1939, and November, 1939, surveys, or when the inside of No. 1 hold was examined on the voyage out to Africa (561, 562, 869, 870), or when the outside of the plating was examined while the ship was loading in Africa (1040-1042).

The Decisions Below

The District Court did not find that the plating was worn more than three times beyond the maximum wear considered safe, but that the plate, when measured after it had been removed on the return to New York showed more than a reduction in thickness of 25%, the limit usually accepted as the maximum, and that therefore as to No. 1

hold the vessel was unseaworthy (1274). The Circuit Court of Appeals speaks of the plating being thin in excess of 75%, saying, however: "though, of course, this is hindsight;" (1343). It of course referred to the condition of the plate after the vessel had gone through the mountainous seas to Bermuda, had wedges driven in where the cracks were (1294), had the plate scaled there (203) and a patch put over the cracks and sailed to New York through heavy seas (1295) and after the oxidized metal had come out of the groove. It properly found on the evidence that the plating had been hammer-tested, inside and out, before the voyage, and numerous visual examinations made by fifteen men and that what appeared as the exercise of due diligence disclosed no flaws (1343), and that although the libellants contended that more stringent tests should have been applied, no such practical tests, however, were proposed, nor did the libellants' witnesses suggest any different hammering of the plates than that done by the numerous surveyors and other persons who examined the ship. Accordingly the Court held that the District Court's findings of due diligence were by no means clearly erroneous (1343).

The District Court had found that the vessel encountered winds and seas of a violence rarely encountered on any sea (1281) and that the winds and waves caused the grooving and cracking of the G-2 plate, making manifest a latent defect which, with the exercise of due diligence, had not been ascertained (1281). It found that the plating and beams could be easily inspected between the cargo battens (1288); that on the January, 1939 and the November, 1939, surveys, the port engineer, marine superintendent, surveyors of the American Bureau of Shipping, United States Local Inspectors of the Department of Commerce and the ship's officers, all experienced men, *on careful inspections, made in the usual and approved manner,* found no excessive corrosion and no grooves in the G-2 plate; that "the thinness of the plate could only have been found by drill-

ing, which certainly could not have been required, unless something appeared to the eyes which required it" (1279, 1289, 1290); that the beans did not get into the rose box leading to the pumps through any fault of the ship (1296); that the carrier exercised due diligence to make the Zarembo seaworthy, and that the damage was caused by a peril of the seas and not by any negligence of the ship (1296).

On the facts the Circuit Court of Appeals held that it need not go further into the niceties of examinations for seaworthiness for the District Court's findings of due diligence were by no means clearly erroneous (1343). On the question of perils of the sea, it held that the evidence clearly supported a finding that the ship ran a gauntlet of perilous seas, one of which, of quite a freakish nature, shook the whole vessel violently, rivet heads popping off with the straining of the ship and a long list of other heavy weather damage was enumerated (1344). It did not criticize or overrule the District Court's finding that the damage was caused by perils of the seas, saying it was unnecessary to find that these perils alone proximately caused the damage, because of the finding of due diligence which it affirmed, saying: "At least perils of the sea were a contributing cause of the damage;", the vessel beginning to leak only after unusually severe weather, which was further support for the conclusion that the shipowner should be exculpated from liability for sea water damage under the Carriage of Goods by Sea Act, § 4(2), which provides that the shipowner shall not be liable for perils of the sea (1344).

The statement that, there being no conflict of evidence as to what was done by any of the witnesses whose testimony is relied on to establish diligence raises a pure question of law, simply begs the question. It overlooks entirely the testimony that the method of examination adopted was the usual one found to be acceptable, as found by the District Court (1279) and that the witnesses found that they

had been able to discover defects by such examinations (958, 959, 304) and that it is all that is necessary to discover such defects (329); also that the experts on both sides disagreed as to the causes of the defect, and the thoroughness of the inspections (396-405, 428-432).

On the face of the opinion of the Circuit Court of Appeals it is quite unfair to characterize its conclusion as one resting upon the fact that the vessel had gone through two surveys and some of the plating had been hammer-tested and numerous visual examinations made. It found that the plating was hammer-tested inside and out (1343). The assumption that no one would seriously contend that a competent and diligent surveyor could not by proper examination ascertain the unseaworthy condition of a steel plate which has wasted away, in two grooves several feet long on both the outside and inside to one-quarter of its original thickness, again begs the question. Before the damage, as we have seen, there was no evidence of any groove on the outside or the inside, or that the plate had wasted away visibly, and only after the vessel returned to New York was it found that the metal had been oxidized and weakened along what became the grooves when the plate cracked.

The assumption on page 6 of the brief that the decision below could be explained only on one of two theories there stated, gives little credit to the wisdom of that Court. *No one contended in either of the lower courts* that the requirement of due diligence is satisfied by employing reputable surveyors and the customary crew. Nor is any such rule even suggested in the opinion of either Court or in the findings of fact or conclusions of law below. Indeed, the District Court expressly held to the contrary, citing the very case on which petitioners rely (*International Navigation Co.* v. *Farr & Bailey Manufacturing Company,* 181 U. S. 218 (1274). His decision (on that point called "lip service" by petitioners) was affirmed in all respects except as to his conclusion on the claim clause of the bill of lading

on which two of the Circuit Judges disagreed with him. This question became immaterial, however, as we have pointed out.

The other theory mentioned is that the Court must have found that the surveyors and others exercised due diligence by merely looking at the G-2 plate and hammer-testing a few others. We have amply demonstrated that the lower courts based their decisions on no such finding or conclusion.

Questions Involved

As we have seen, Question I on page 7 of petitioners' brief does not arise at all. Both Courts answered this question "No" and no one in the case ever contended to the contrary. It would require a vivid imagination indeed to think that such a question was ever in the case.

Question II is based on incorrect assumptions of fact, as shown above, and therefore was never in the case. It overlooks the fact entirely that there was no gradual wasting away of the outside shell, the evidence showing that there were no grooves before the ship sailed on the voyage; that the place where the plate weakened and finally cracked had been filled with hard scale or oxidized metal which, along the line of the cracks, could not be dug out with a knife, and it required a cold chisel or sharp instrument and hammer to dislodge such scale along the line of such a groove after the ship returned (282, 285, 350, 352, 1091, 1092, 1125-1127, 342, 343, 333). The reference to the fourth of the original thickness referred to the thickness of the metal at the base of the cracks after the ship returned and the plate had been taken off long after the original failure and after wedges had been driven in the cracks and the edges had worked on each other during the remainder of the voyage (584, 895)—"hindsight" as the Circuit Court of Appeals aptly said.

Reasons for Not Granting the Writ

1. The Circuit Court of Appeals Has Not Decided Any Important Question of Law Which Has Not Been Settled by This Court

The history leading up to the adoption of the Carriage of Goods by Sea Act given on page 8 of the petition is interesting but not of great importance in this case except so far as it shows one purpose was to relieve the shipowner from liability for damage not due to any failure to exercise due diligence, whereas under the Harter Act the ship was liable even if the failure to use due diligence did not cause the damage, as held in *May* v. *Hamburg Amerikanische &c.* [*The Isis*], 290 U. S. 333. So far as due diligence is concerned, it adopted the language of the Harter Act and the Courts all agree that the rule as to the requirement of due diligence is the same under both acts. Indeed, this is one point on which the District Court (1274), the Circuit Court of Appeals by its affirmance, and counsel on both sides in this case agree (see Petitioners' Brief, pp. 9-10). This Court has laid down the rule as to due diligence in a number of cases. (See: *The Wildcroft*, 201 U. S. 378; *The Silvia*, 171 U. S. 462; *International Navigation Company* v. *Farr and Bailey Manufacturing Company*, *supra.*)

2. The Decision of the Circuit Court of Appeals Conflicts With No Decision of Other Circuit Courts of Appeals or of This Court

As we have seen, neither of the lower Courts even suggested that a shipowner could discharge his duty by employing reputable surveyors or delegate his duty of due diligence, nor did anyone so contend.

On page 10 petitioners seem aggrieved that the Circuit Court of Appeals did not mention *International Naviga-*

tion Co. v. *Farr & Bailey Manufacturing Co.*, but why should it as the District Court whose decision was affirmed by the Circuit Court of Appeals based its decision on the rule established by that case and the decisions of other Circuit Courts of Appeals cited on page 9 of petitioners' brief? Both Courts based their decisions on the care which was exercised by the witnesses in the examination and testing of the plating (1343, 1279).

Answer to Petitioners' Brief

Point I Is Already Answered Above

Petitioners' Point II on page 17 again begs the question. It attempts to make "hindsight" (the word used by the Circuit Court of Appeals) and what occurred after the accident determine the rule which should be applied to inspections before the accident. In other words, it makes the result determine the diligence.

There was no evidence of surface corrosion that could be seen before the accident and the District Court so found on the evidence (1281) and its decision was affirmed. All that was found were the grooves in the line of the two cracks after they occurred which is the only time that such grooves are found, as Mr. Lyell Wilson and Mr. Haight with their years of experience testified (292, 350-352) and as proven by the fact that oxidized metal or scale in a groove had to be dislodged by a hammer and cold chisel. The use of an ordinary jacknife was of no effect.

The record shows that those who inspected the Zarembo on at least three occasions before the voyage in question paid particular attention to the forward plates in the No. 1 hold which included the G-2 plate, even gouging in with a steel scraper where this plate joined the fore and aft beam, using a knife on it, and hitting the plate with a scraper and striking the plates in the forward hold with

a hammer (599, 606, 611-612, 551, 950, 561, 959-960, 554-556). The reference to heavy sweating of the holds in this vessel's trade has no weight, first for the reason that it could only occur about twice a year and then only for two or three days, for the reason that such vessels made only about four voyages to Africa in a year and it was only in the winter time, in coming this way for several days from warm to cold air that any sweating could occur (108, 487), and second, as the District Court found, there were drain holes in the longitudinal beams, about ¾″ in diameter, about 1″ from the ship's side and about 6″ apart to draw down any sweat (1288, 1081).

The fact that the F-1 plates were so carefully examined and drilled in January, 1939, shows as both Courts held, that the surveyors were probably spurred on to exercise even more care in the tests actually employed on the forward part of the vessel (1344, 1279). Moreover, the so-called wasted condition of the F-1 plates was a totally different condition from that found in the G-2 plate. The one was a surface wastage caused by chafing of the anchor chain and water friction (555). The other was a latent defect in the G-2 plate caused by panting strains.

In *The Tela*, 1936 A. M. C. 838 (petitioners' brief, p. 20) it was admitted that the plating of the ship had not been examined for over a year before the breakdown and the surveyor who made the examination was not examined as a witness but only a letter from him produced. There is no suggestion in the opinion that the plating should have been hammered.

In *The Millie R. Bohannon*, 64 Fed. 883 (petitioners' brief, p. 19), the schooner when five days out met a dead calm and rolled considerably in a heavy swell, springing a leak and taking in three feet of water in spite of the pumps. The opinion does not show what inspection was made before sailing so is not helpful.

In *Brazil Oiticica, Ltd.* v. *The Bill,* 47 F. Supp. 969, the damage was due to a hole in the bilge pipe caused by the corroding effect of sulphurous acid and copper salts in combination with seawater, which could have been avoided by cleaning the holds and bilges after carrying sulphur and copper, which was not done. It was held that the shipowner did not exercise due diligence, and was chargeable with knowledge of the effect of such cargoes. There had been no inspection of the pipe. The Carriage of Goods Act (U. S. Code, § 1304 (2) (a) to (p)) provides that the ship shall not be responsible for loss or damage arising or resulting from "* * * (p) Latent defects not discoverable by due diligence." The statement in the opinion that the latent defect was not due to any flaw in the metal is not material to the decision.

In *The Julia Luckenbach,* 235 Fed. 388, the hull of the vessel at the place in question, where a hole was rusted through and the leak occurred, had not been thoroughly inspected for more than a year and it was known that sugar cargoes caused the corrosion which occurred. In fact, one witness testified that a ship's plates could be eaten away by such a compound in less than twelve months.

In *The Georg Dumois,* 88 Fed. 537, four days after the vessel left New York the stay bolts in the boiler leaked to such an extent as to deprive the vessel of operating power and when removed it was found that the threads of the bolts were corroded and the plates were so impaired where the bolts entered that they were reamed out and larger bolts necessarily used. It is not shown what inspection of the bolts there was before leaving port. Under the wording of the charter party the court held that the owners agreed to maintain the vessel in a thoroughly efficient state in hull and machinery (p. 542). As we see it this case did not involve the Harter Act at all, which deals with bills of lading—not charter parties—and the Harter Act does not appear to

have been incorporated in the charter party. The case finally turned on the point that the owners did not fulfill such warranty in the charter.

In *Nord-Deutscher Lloyd* v. *President, etc. of Insurance Co. of North America*, 110 Fed. 420, a lighter began to leak heavily in Baltimore Harbor and overturned shortly after being released from a steamer, due to improper caulking and lack of proper inspection. It is difficult to see how the Harter Act could apply to such a case as it is limited to a vessel transporting merchandise to or from any port in the United States and does not exempt the vessel from liability for unseaworthiness, even if due diligence is exercised.

POINT I

The concurrent findings of the two lower Courts that due diligence was exercised and the damage caused by perils of the sea are findings of fact and should not be disturbed.

In *The Wildcroft*, 201 U. S. 378, 387, the findings of due diligence by both the District Court and the Circuit Court of Appeals were treated as concurrent findings of fact and therefore were not disturbed.

In *The Quarrington Court*, 1941 A. M. C. 1234 (C. C. A., 2) it was recognized that a finding of due diligence in a cargo damage case was a finding of fact.

To the same effect see *The Venice Maru*, 1943 A. M. C. 277, 285, 286.

It makes no difference whether the determination of a question of fact is called a finding or a conclusion. Its treatment is the same. See *The Venice Maru* (*supra*).

Obviously the question of due diligence must have been a question of fact because it depended on the testimony as to what the surveyors and other numerous witnesses did

with the plating, whether the inspection was the usual and accepted one, and whether it had been found sufficient to discover defects in plating.

Admiralty rule, 46½ of this Court, provides that a finding of fact of the District Court shall not be set aside unless clearly erroneous. In construing this rule it was held in *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 126 F. (2d) 992, that the power to review the facts in an admiralty case is no broader than that under the Federal Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous and hence findings on conflicting evidence should not be disturbed.

The District Court found in the case at bar:

> "From the foregoing it seems clear that inspections were carefully made in the usual and approved manner" (1279).

That Court further found that "the thinness of the plate could only have been found by drilling, which certainly could not have been required, unless something appeared to the eyes which required it" (1279); "The wind and storm from which the 'Zarembo' suffered was a peril of the sea" (1282); that the Zarembo had continuously maintained the highest class of the American Bureau of Shipping, was inspected by its surveyors and the United States Local Inspectors yearly, and whenever she was on drydock, and complied with all requirements (1289); that in November, 1939, and in January, 1939, just before she sailed on the voyage in question, the Zarembo had been examined by the Port Engineer and Marine Superintendent of her owner, surveyors of the American Bureau, United States Local Inspectors and the ship's officers, all experienced men, none of whom found any unusual corrosion, and none of whom found any groove in the G-2 plate (1289); that on leaving the last port in Africa the Zarembo was in good condition, properly manned, equipped and

supplied (1293); that the "carrier at and before the beginning of the voyage exercised due diligence to make the ship 'Zarembo' seaworthy" (1296); that "The damage * * * was caused by a peril of the sea and not by any negligence of the ship or those for whose actions she is responsible" (1296); "The effect of the winds and waves was to cause panting of the 'Zarembo,' grooving, and the cracking of the G-2 plate, * * * thus making manifest a latent defect in the G-2 plate, which, with the exercise of due diligence on the part of the ship and her owner, had not been ascertained" (1281).

The Circuit Court of Appeals affirmed the District Court's decision without criticising or setting aside any of the above findings. It would seem unnecessary, therefore, to discuss the testimony in detail. If, however, the court should wish to examine it, we call attention to the following pages of the record where the testimony amply sustains the findings.

Perils of the sea:

See Hammond (697, 701); Atwood (576-579); Chief Engineer Rice, with 36 years' experience, had never seen such very heavy seas (825-827; 830-831; 855); Chief Officer Atwood, an officer in the naval service, with 24 years' experience, had never seen such weather before on such a voyage, and the steamer took two seas which were about as big as he had ever met with (586-589); Ginder, chief officer of a nearby vessel and with 10 or 11 years in that part of the Atlantic, never saw anything to equal the weather, with seas as high as in two hurricanes he had experienced (1056-1058); statement of damages (1247-1252).

Due diligence:

As to the careful examination made of this ship in January, 1939, and to the effect that no grooves or unusual corrosion were found in the G-2 plate on the outside or

on the inside or on the other surrounding plates, and that the surveyors had a hammer with them, using it on the plates, which is the general practice, the examination being the usual one, enabling one to find out any defects in the ship:

See Gledhill, Port Engineer (300-304); Captain Sparrow, Marine Superintendent (327-329; 332); Capt. Watkinson, United States Inspector (241, 243). He examined and tested the plating in No. 1 hold, including the G-2 plate, with a hammer and found the G-2 plate's condition good with no corrosion (243, 246). His method was the usual one to find any weakness in a plate (247, 248), and his survey took six days; Hammond (724, 726); Mackenzie, American Bureau Surveyor, examined the outside plating, examining all plates, including the G-2 and found everything satisfactory except the F-1 plates which he continued until the next regular drydocking (980-983) but they were then drilled and found satisfactory (Gledhill, 303). He carried a test hammer to pick doubtful spots and if there are any defects the hammer finds them. He saw no defects in the G-2 plate. He knew that vessels of the age of the Zarembo were prone to have weakened plates caused by panting and he had them in mind when he examined the forward plates (992). Hammond, second mate accompanied the American Bureau Surveyor and United States Inspector Watkinson on their inspection of the inside of No. 1 hold and found the G-2 starboard plate in good condition with no indentations or grooves (668, 669). He inspected this plate on the outside in drydock with the United States Inspector and American Bureau Surveyor and found the G-2 starboard plate all right with no dents or depressions (670-671).

As to the November, 1939, survey: Capt. Sparrow, Marine Superintendent, accompanied by American Bureau Surveyor Wilson, examined the outside plating, including

starboard G-2 plate. There was no evidence of undue corrosion or grooves (330-332). Atwood, Chief Officer, with U. S. Inspector Kelly, examined the inside of No. 1 hold, Kelly with his hammer knocking rivet heads and various places on the plates, looking for loose rivets or weak spots or corrosion (550). Atwood, with a steel scraper, using one end to sheer into and scrape off any film of rust and the other to knock the plate, climbing up the longitudinals, paying particular attention to the forward plates, including the G-2, *remembered distinctly knocking around on the G-2 plate and gouging the scraper along the longitudinals* and finding solid metal in the plate (551, 552) with no corrosion and no grooves (552, 553). American Bureau Surveyor, Narter, examined the plating in lower No. 1 hold, including the G-2 plates, climbing up longitudinals, using a hammer where there was any suspicion of corrosion or scale to determine wastage and whether it was advisable to drill. He found no depression or grooves or any accumulation of scale that warranted further examination; found the G-2 plate in satisfactory condition (265-266, 673-675). The survey was continued on the outside by two American Bureau surveyors, United States Inspector Kelly, Mr. Gledhill and Captain Sparrow. They found no grooving in the starboard *G*-2 plate and the surveyors used the usual hammer and made a very careful survey (Gledhill, 305, 306).

POINT II

The following authorities amply sustain the findings of due diligence and latent defect.

The Emilia, 1936 A. M. C. 22, 13 F. S. 7;
The Floridian, 1936 A. M. C. 1006, 83 F. (2d) 949;
The Francis L. Robbins, 1931 A. M. C. 1340, 49 F. (2d) 648;
The Schoharie, 1937 A. M. C. 610;

The Toledo, 1939 A. M. C. 1300, 30 F. S. 93;
The Bloomersdijk, 1936 A. M. C. 713;
The Sintram, 64 Fed. 884;
The Cameronia, 1930 A. M. C. 443, 38 F. (2d) 522;
The Cerosco, 1928 A. M. C. 403, aff'd. on another point 30 F. (2d) 254, 280 U. S. 320.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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HELEN F. TUOHY,
On the Brief.

Dated, December 22, 1943.